ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION IV

CACR 06-709

MARCH 21, 2007

MICHAEL WADE MYERS and SCOTT LYNN HALL
APPELLANTS

APPEAL FROM THE LONOKE COUNTY CIRCUIT COURT
[NO. CR-2003-204, CR-2003-206]

V.

HONORABLE LANCE LAMAR HANSHAW, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

Appellant Michael Wade Myers and appellant Scott Lynn Hall, who are half-brothers, were each convicted by a jury of various drug-related offenses. Both were convicted of manufacturing methamphetamine, possession of drug paraphernalia with intent to manufacture methamphetamine, and possession of drug paraphernalia. In addition, Mr. Myers was convicted of possession of methamphetamine, and Mr. Hall was convicted of possession of methamphetamine with intent to deliver. Mr. Myers was sentenced to a total of twenty-four years in prison, while Mr. Hall was sentenced to a total of twenty years. In this joint appeal, both appellants argue that the trial court erred in denying their motions to suppress the contraband, and that the evidence was insufficient to support their convictions. We affirm.

At the suppression hearing, it was established that the appellants' mother, Judy Gamet, lived in a residence at 10588 Highway 165 in Scott, Arkansas. Officer Doug Estes of the Arkansas State Police received information from another officer that Mr. Myers and Mr. Hall were manufacturing methamphetamine at that location. Officer Estes also obtained information that there was an arrest warrant for Mr. Myers for a probation violation. Based on this information, Officer Estes and other officers proceeded to that location to investigate on May 16, 2003.

Upon arrival, the officers found Mr. Hall and a man named Joe Hulsey inside a garage on Ms. Gamet's property. The door to the garage was partially open. A power cord was connected between the garage and a nearby mobile home, which was also on Ms. Gamet's property. Upon being confronted by the police, Mr. Hulsey asserted that he was helping Mr. Hall work on a car.

Kevin Collie, who at the time was Mr. Hulsey's parole officer, assisted in the investigation. In the process of speaking with Mr. Hulsey and Mr. Hall, Mr. Hall informed Officer Collie that he was on probation. The police conducted a pat-down search of both men, and both Mr. Hulsey and Mr. Hall were found to be in possession of several small plastic baggies containing methamphetamine. According to Officer Collie, he had authority to search Mr. Hulsey based on his conditions of parole. Officer Collie found Mr. Hall's probation officer's business card in Mr. Hall's wallet, and called her to report what he had found. Officer Collie "asked if she wanted me to do a courtesy search for her and she said

yes." Mr. Hall's probation officer testified at the suppression hearing that as a condition of probation Mr. Hall must submit to a search by a probation officer at their request.

Officer Collie testified that, after Mr. Hall's probation officer gave permission to search, the officers looked around the garage and also inside the mobile home. During the walk-through of the garage, the officer found several packets of pseudoephedrine located under the open hood of the car in repair. Upon looking inside the mobile home, the police observed numerous items used in the manufacture of methamphetamine. Based on this information, the police sought and obtained a warrant to search the mobile home.

During the search of the mobile home, the police seized contraband used to manufacture methamphetamine. While executing the search, the police also proceeded to a small white residence on adjacent property owned by Karen Hall, who is Mr. Hall's ex-wife. According to Officer Collie, there was a video camera in the window of the residence. When Officer Estes attempted to open the door to the residence, he felt an electric shock from the doorknob. After gaining entry, Officer Estes "found something like a cattle fence attached to the doorknob and plugged in to a 110-volt electrical outlet." The police asked if anyone was in the building, and there was no response. Subsequently, Mr. Myers was found in the back of the house, and was taken into custody. In the kitchen cabinet of the house, the police found a pill soak in a bottle with pseudoephedrine hydrochloride and methanol, which is a process used in the manufacture of methamphetamine.

Ms. Gamet testified that, on the day of the searches, Mr. Hall lived in her house at 10588 Highway 165. She stated that Mr. Myers was living in Texas at the time, and that she did not know he was on her neighbor's property that day until he was arrested by the police. According to Ms. Gamet, the trailer searched by the police has its own address, although it had been more than six months since anyone had lived there. Ms. Gamet stated that she owned the trailer, but that Mr. Hall "had access to plug in his cord if he wanted to, like the cord that was plugged in when they came out there that day." Ms. Gamet testified that on the day at issue the police asked for her consent to search and that she repeatedly refused, a fact not disputed by the police.

Ms. Hall testified that she lives in Cabot and, while she owns the white house adjacent to Ms. Gamet's property, she has not lived there in more than eight years. Ms. Hall stated that Mr. Myers was not renting her property in May 2003, and that "I didn't have any idea he was living out there." She indicated that at that time she thought the house was vacant and locked, and stated that Mr. Myers did not possess a key or have specific permission to enter. However, Ms. Hall indicated that she has a good relationship with Mr. Myers, that he had lived with her when he was younger, and that "I wouldn't really have an issue with him spending the night in that house if he chose to."

Officer Estes testified again at the appellants' jury trial. Much of his testimony about the events of May 16, 2003, was substantially the same as that elicited at the suppression hearing. Officer Estes also gave additional testimony that some stained coffee filters were

seized from the garage where Mr. Hall and Mr. Hulsey were found. He further stated that upon executing the search warrant on the trailer, he observed smoke or haze and a chemical odor emitting from the doorway area. Officer Estes testified that upon entry into the white house, the police found Mr. Myers "hiding" in the back. On the kitchen counter in the white house the police found a burnt aluminum-foil smoking device containing methamphetamine residue, as well as a police scanner.

Although listed as a second point on appeal, both appellants challenge the sufficiency of the evidence to support their convictions. When an appellant challenges the sufficiency of the evidence on appeal, we address that argument prior to any other alleged trial errors. *Williams v. State*, 338 Ark. 97, 991 S.W.2d 565 (1999). In making our review, we view all of the evidence, even that which may have been erroneously admitted, in the light most favorable to the State. *Dodson v. State*, 88 Ark. App. 380, 199 S.W.3d 115 (2004). The test is whether there was substantial evidence to support the verdict. *Martin v. State*, 354 Ark. 289, 119 S.W.3d 504 (2003). Substantial evidence is evidence that is forceful enough to compel a conclusion beyond suspicion or conjecture. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003).

Mr. Hall argues that there was no substantial evidence that he possessed any of the contraband seized from the garage or the trailer.[1] Mr. Hall notes that he was not found to

[1]Mr. Hall does not challenge his possession of the plastic baggies of methamphetamine, which resulted in his conviction for possession of methamphetamine with intent to deliver.

be in actual possession of any of these items. He acknowledges that constructive possession, which is the control or right to control the contraband, may be established by circumstantial evidence. *See Knight v. State*, 51 Ark. App. 60, 908 S.W.2d 664 (1995). However, when circumstantial evidence is alone relied on for a conviction, it must indicate guilt and exclude every other reasonable hypothesis. *Id*. In this case, Mr. Hall submits that there was a reasonable alternative to his guilt, and contends that only conjecture could support the jury's finding that he possessed the items in the garage, or even knew about the items in the trailer.

In support of his challenge to the sufficiency of the evidence, Mr. Hall notes that both he and Mr. Hulsey were found in the garage, and asserts that there was nothing to link him to the pseudoephedrine or coffee filters that were found there. With regard to the trailer, Mr. Hall relies on the fact that it belonged not to him but to his mother, and he argues that there was no evidence that he resided in the trailer or had any control over it. Because of these deficiencies in the proof, Mr. Hall contends that his convictions pertaining to the drug paraphernalia and manufacture of methamphetamine must be reversed.

Similarly, Mr. Myers argues that his convictions must be reversed because there was insufficient evidence that he constructively possessed any of the contraband seized from the white house. He notes that the pill soak was found inside a closed kitchen cabinet, and that the foil pipe with methamphetamine residue was also found in the kitchen. While Mr. Myers was in the house when the police entered to search, he asserts that he was in the back of the residence and that no items of contraband were found on his person or in that

area of the house. He contends that his presence alone inside the house was not enough to link him to the contraband, and relies on *Sanchez v. State*, 288 Ark. 513, 707 S.W.2d 310 (1986), where the supreme court reversed co-appellant Piercefield's conviction where Piercefield was found hiding in the closet of a house, but not where any drugs or paraphernalia were found.

We hold that there was substantial evidence that Mr. Hall constructively possessed the items seized from the garage and mobile home. While he asserts that he was jointly occupying the garage when the police arrived, it is significant that he, and not Mr. Hulsey, lived on the property at issue. In plain view in the garage, the police found pseudoephedrine and stained coffee filters, and a power cord had been connected between the garage and the nearby trailer. There was evidence of a smoke or haze being present and a chemical odor emitting from the trailer, and Mr. Hall was found to be contemporaneously in possession of several baggies of finished product of methamphetamine. Under these circumstances, there was sufficient evidence to demonstrate Mr. Hall's knowledge and control over the contraband.

We also hold that there was substantial evidence to support Mr. Myers's convictions. This case is distinguishable from *Sanchez v. State*, *supra*, because in that case there were multiple suspects located in the house, some of whom were found with quantities of illegal drugs and paraphernalia. By contrast, Mr. Myers was the exclusive occupant of the white house, and as such he was evidently the person who connected the shocking device to the

outside doorknob. Officer Estes testified that Mr. Myers was found hiding in the back of the house, which is further corroboration of his guilt. *See Ross v. State*, 346 Ark. 225, 57 S.W.3d 152 (2001). The foil pipe with methamphetamine residue was found in plain view, as well as a police scanner. There was testimony that the pill soak found in the kitchen cabinet was creating a primary ingredient for the manufacture of methamphetamine. The jury did not have to engage in speculation in concluding that Mr. Myers constructively possessed the illicit items and was guilty of the crimes with which he was charged.

The appellants' remaining arguments on appeal are that the trial court erred in denying each of their motions to suppress the contraband. The trial court denied Mr. Hall's motion to suppress on the basis that (1) there was reasonable cause to search Mr. Hall's person upon finding him with Joe Hulsey and having reasonable information that Mr. Hall and Mr. Myers were manufacturing controlled substances, and ascertaining verbally that Mr. Hall was on probation, and (2) Mr. Hall lacked standing to challenge the search of the premises. The trial court denied Mr. Myers's motion to suppress on the basis that he also lacked standing to contest the premises searched by the police. Both appellants contend that they had standing to challenge the searches, and further assert that the searches and seizures violated their constitutional rights under the Fourth Amendment of the United States Constitution and Article 2, section 15 of the Arkansas Constitution.

We first address Mr. Hall's contention that the baggies of methamphetamine were illegally seized from his person. Mr. Hall acknowledges that he was on probation at the time

of the search, and that in *Cherry v. State*, 302 Ark. 462, 791 S.W.2d 354 (1990), our supreme court held that "consent-in-advance" is not a violation of any constitutional rights of a parolee because the supervision of parolees and probationers is a special need of the State, permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large. However, Mr. Hall asserts that in determining whether the search was carried out under the terms of the consent, the following two issues must be addressed: (1) were there reasonable grounds to investigate whether the appellant had violated the terms of his parole, and (2) was the search conducted by the parole officer. *See id*; *Freeman v. State*, 34 Ark. App. 63, 806 S.W.2d 12 (1991). In the present case, Mr. Hall argues that the second requirement was violated. He submits that because the search of his person was not conducted by his probation officer, and that his probation officer did not give consent for the search until after it had been conducted and the contraband seized, the search of his person was unlawful.

Mr. Hall further contends that the search of his person cannot be validated as a weapons search for officer safety under Ark R. Crim. P. 3.4, which provides:

> If a law enforcement officer who had detained a person under Rule 3.1 reasonably suspects that the person is armed and presently dangerous to the officer or others, the officer or someone designated by him may search the outer clothing of such person and the immediate surroundings for, and seize, any weapon or other dangerous thing which may be used against the officer or others. In no event shall this search be more extensive than is reasonably necessary to ensure the safety of the officer or others.

Mr. Hall directs us to Officer Collie's testimony where he stated, "I wanted to search for officer safety," and that "I wasn't scared of Mr. Hall, but it was standard policy." Because

Officer Collie had no reasonable suspicion that Mr. Hall was armed and presently dangerous, Mr. Hall argues that Rule 3.4 does not apply. Moreover, he contends that even if a weapons search had been authorized, the seizure of the baggies of cocaine exceeded the scope of the search.

In reviewing a suppression challenge, we conduct a *de novo* review based on the totality of the circumstances, reviewing findings of historical facts for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the trial court. *Davis v. State*, 351 Ark. 406, 94 S.W.3d 892 (2003). Given the totality of the circumstances in this case, we need not decide whether the pat-down search was authorized as a search for weapons because we hold that it was lawful pursuant to the consent-to-search given by Mr. Hall when he was placed on probation.

Mr. Hall's conditions of release on probation, which he signed, contains the provision, "submit your person, place of residence or vehicle to search, and consent to seizure of any evidence or contraband whenever requested to do so by a probation officer." While Officer Collie was not assigned as Mr. Hall's specific probation officer, he testified that he is employed with the Arkansas Department of Community Correction, Probation/Parole. Officer Collie determined that Mr. Hall was on probation, and his status as a parole officer permitted him to conduct the search pursuant to the consent executed by Mr. Hall.

We note that Mr. Hall appears to argue in his reply brief that the search of his person was also invalid because there was no reasonable ground that he had committed a probation violation. However, an argument cannot be raised for the first time in a reply brief. *State v. McCormack*, 343 Ark. 285, 34 S.W.3d 735 (2000). Nonetheless, the officer conducting the pat-down search had information that Mr. Hall was committing a probation violation by manufacturing methamphetamine, and at any rate the consent-in-advance executed by Mr. Hall did not contain any provision for reasonable grounds as a prerequisite to search. We note that Mr. Hall does not challenge the validity of his consent.

We now turn to Mr. Hall's contention that the contraband seized from the trailer should have been suppressed. We conclude that the trial court correctly determined that Mr. Hall lacked standing to challenge the search.

The rights secured by the Fourth Amendment are personal in nature. *Gaylord v. State*, 354 Ark. 511, 127 S.W.3d 507 (2003). Thus, a defendant must have standing before he can challenge a search on Fourth Amendment grounds. *Id*. A person who is aggrieved by an illegal search and seizure only through introduction of evidence secured by the search of a third person's promises or property has not had any of his Fourth Amendment rights violated. *Id.* In *Mazepink v. State*, 336 Ark. 171, 987 S.W.2d 648 (1999), the supreme court stated that evidence should not be excluded unless the court finds that an unlawful search or seizure violated the defendant's own constitutional rights; his rights are violated only if the challenged conduct invaded his legitimate expectation of privacy, rather than that of a

third party. A legitimate expectation of privacy means more than a defendant's subjective expectation of not being discovered. *Id*. The proponent of a motion to suppress bears the burden of establishing that his Fourth Amendment rights have been violated. *McCoy v. State*, 325 Ark. 155, 925 S.W.2d 391 (1996).

In the case at bar, Mr. Hall failed to establish any legitimate expectation of privacy in the trailer. It is undisputed that he did not live in the trailer and had no ownership interest. Mr. Hall's mother, Ms. Gamet, testified that she owned the trailer and that it was vacant at the time of the search. While she testified that "Scott had access to plug in his cord if he wanted to, like the cord that was plugged in when they came out there that day," this limited access to the trailer falls short of establishing standing to contest the search of the trailer.

Mr. Hall argues in his brief that "if his residence at 10588 is the only thing that confers upon Hall the responsibility and control over items in another building located on that tract of land, then that same residence allows him to challenge the search of those buildings." We disagree. First of all, his residence on his mother's property was not the only evidence to link him to constructive possession and control over the items in the trailer, given that he was found in a nearby shed with a cord connected to the trailer; that the shed contained items used to manufacture methamphetamine that were in plain view; that methamphetamine was found on Mr. Hall's person; and that an odor along with smoke or haze were emanating from the trailer prior to the police search. Moreover, the State correctly points out that a trial court may determine that a defendant did not meet his burden

of establishing standing at a suppression hearing, and this in no way contradicts a jury's subsequent determination that the State proved constructive possession at trial, as these decisions are based on discrete evidence. In *United States v. Poulack*, 236 F.3d 932, 936 (8th Cir. 2001), the federal appeals court stated, "A defendant may be found to possess illegal contraband even if he did not have Fourth Amendment standing, for standing is required to raise a constitutional challenge but does not protect an individual from prosecution." Thus, there is no inconsistency in our holding that substantial evidence supports Mr. Hall's convictions and that he lacked standing to challenge the search of the trailer. Based on our holding that Mr. Hall lacked standing, we need not address whether or not the search of the trailer was authorized.

Finally, we address Mr. Myers's argument that the search of the white house was illegal. We have no hesitation in holding that Mr. Myers had no expectation of privacy in the house, and thus lacks standing to contest the search. Karen Hall owns the house, and indicated that it was vacant at the time of the search. She had not given Mr. Myers permission to enter her property, he did not have a key, and Ms. Hall did not even know he was there. Under such circumstances, the trial court committed no error in ruling that there was no violation of Mr. Myers's constitutional rights.

Affirmed.

GLADWIN and GRIFFEN, JJ., agree.